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Supreme Court of the United States

OCTOBER TERM, 1943

No. 426

LESTER FOLLETT, APPELLANT,

versus

TOWN OF McCORMICK, SOUTH CAROLINA,
RESPONDENT

APPEAL FROM THE SUPREME COURT OF SOUTH CAROLINA

RESPONDENT'S BRIEF

J. FRED BUZHARDT,
JEFF D. GRIFFITH,
Counsel for Respondent.

The R. L. Bryan Company, Legal Printers, Columbia, S. C.

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RESPONDENTS' BRIEF

FACTS SHOWING QUESTIONS PRESENTED

The respondent regrets that it cannot agree with the statement of facts made by appellant in his brief, but it feels that the facts, as shown by appellant's brief, do not correctly give a history of the case and sufficient facts to enable the Court to pass upon this case.

Appellant, Lester Follett, became a resident of the Town of McCormick some time before his arrest, and, at the time of his conviction, resided in said town (Record, 4). He claimed to be a regularly ordained minister, and he engaged in selling books in the Town of McCormick, South Carolina. His arrest followed his refusal to obtain a license

required by a town ordinance which provided: "That the following license on business, occupation, and professions to be paid by the person or persons carrying on or engaged in such business, occupation or professions within the corporate limits within the Town of McCormick, South Carolina." This ordinance, among other things, requires agents selling books to pay a license of one dollar per day or fifteen dollars per year. At the time he undertook to sell and did sell the book entitled "Children," appellant distributed a pamphlet entitled "End of Axis Powers" (Record, 8). Although he claimed to be a member of a sect known as "Jehovah's Witnesses," and this group or organization pretends to be a religious organization, distributing Bibles, books, booklets and magazines (Record, 2), there is no evidence in the record nor was there any before the Town Court of McCormick, the Circuit Court of General Sessions, or the Supreme Court of South Carolina, that appellant ever attempted to preach any religion, promote any religious beliefs, or sell any Bibles in the Town of McCormick. It is true that the certificate offered in evidence by the appellant stated that he was an ordained minister of Jehovah God, one of "Jehovah's Witnesses," and that, as Jehovah's witness, he offered Bibles, books, booklets and magazines free to those who are poor or on contribution. However, there is no testimony that he offered to sell Bibles, to preach the Gospel, or to convert anyone to his way of thinking. The only conflict in the testimony, as presented to the jury in the Mayor's Court, was that the appellant claimed that he offered to place his book, "Children," on "contribution," and the witnesses for the town claimed that he did not mention contribution but attempted to sell the book in question (Record, 6).

At the close of the testimony the appellant moved for directed verdict of not guilty on the grounds that the or-

dinance was in violation of the United States Constitution in that it restricted the freedom of worship. This motion was overruled and the appellant was found guilty by the jury (Record, 6). Within due time a notice of appeal was given to the Circuit Court of General Sessions, which Court upheld the findings of fact and the conclusions of law reached by the Mayor's Court, and thereafter the case was appealed to the South Carolina Supreme Court. This Court, the same Court which handed down the opinion in the case of *State v. Meredith*, 197 S. C., 351, held that the facts in the case before the Court were entirely different from those in the *Meredith case*, and affirmed the judgment of the Courts below.

In setting out the facts in this case the respondent feels that it is necessary to call particular attention to the type of book being sold and the pamphlet distributed by the appellant.

The title of the book which was offered for sale, and was sold in the Town of McCormick, was "Children." A casual reading of the book shows that the name of the book is entirely misleading, that it is definitely not a book capable of being understood by a child, but is a name given the book for the purpose of concealing what it really is (Record, 7). Although the appellant claims that the book is a religious book it carries such statements as: "Religious organizations furnish no protection whatever to the people. Religion is entirely contrary to the will of God, and is a snare. Today religion is fully united with dictators or arbitrary rulers of the earth." * * * "Religious ceremonies produce no good results, and are in vain and injurious. Religion is heathenish." * * * "Religion is demonism." * * * (Record, 8.)

At the time the appellant undertook to sell and did sell the book, "Children," he distributed copies of the pamphlet

mentioned above, "End of Axis Powers." According to the opinion of the Circuit Judge who heard this case this name is entirely misleading. The appellant and the society for which he worked is undertaking to defy all government and to set up what they call Theocracy. Quoting from the pamphlet, "End of Axis Powers" (Record, 8, 9):

> "The facts are indisputable, and therefore admitted, that the Nazis, Fascists and the mightiest religious organization on earth, acting together and designated as 'the Axis Powers,' now rule from Norway to Egypt and within that realm the people mourn. That ruling power is opposed to the Kingdom of God under Christ and violently opposes everyone who advocates The Theocracy.
>
> "Opposing the Nazi, religious combine is another mighty world power, carried on by the political and commercial strong men of those nations, and ably supported by religious leaders. That world power is generally known as the advocate of Democracy, and during the World War from 1914 to 1918 adopted and used the slogan: 'This war will make the world safe for democracy.' That ruling power does not advocate the kingdom of God and hence is against The Theocracy.
>
> "The only hope for peace and life rests in The Theocratic Government. All persons now on earth who expect or hope to live must flee to that righteous government, and all others shall be destroyed."

It appears that appellant was not, at the time of his arrest and trial, a minister but an agent appointed by the Watchtower Bible and Tract Society of Brooklyn, N. Y., and that the book he was selling was not religious at all, but a mere propaganda publication (Record, 8).

Respondent agrees that there are few issues for the Court to determine in this case. If the appellant is an itinerant minister of the Gospel, and, if his activities complained of in the present instance were for the purpose, primarily, of promoting his religious beliefs, then there is

no doubt that this case is similar to the cases of *State v. Meredith*, 197 S. C., 351, and *Murdock v. Pennsylvania*, 319 U. S., 105. However, the record shows that appellant is not an itinerant minister since he lived in the Town of McCormick. The defendant testified that he made a living from money received from those with whom he placed the books; that he had no other source of income. He denied that he "sold" the books but stated that he left them with persons contributing the amount of twenty-five cents. The witnesses for the Town of McCormick testified that nothing was said about contributing but that the books were offered to and sold to them for the sum of twenty-five cents each (Record, 7).

POINTS FOR ARGUMENT

I

Was appellant an itinerant preacher, a religious colporteur, primarily engaged in a religious activity, or was his activity that of selling books, primarily for the purpose of earning a livelihood?

II

Was the ordinance in question void and unconstitutional on its face and as construed and applied to a book agent's activities because it abridges and unduly burdens by taxation the exercise by appellant of his right of freedom of press, contrary to the First and Fourteenth amendments to the United States Constitution?

ARGUMENT

I

Was appellant an itinerant preacher, a religious colporteur, primarily engaged in a religious activity, or was his

activity that of selling books, primarily for the purpose of earning a livelihood?

In this case the appellant claims to be a minister of the Gospel. According to his own testimony, as shows on the certificate introduced in evidence (Record, 2), he was ordained to preach and commissioned by God Himself. Evidently every person becoming affiliated with the Watchtower Bible and Tract Society and taking the name of Jehovah's Witness immediately becomes ordained by God to preach and enjoys all the privileges usually accorded ministers of the Gospel, whether itinerant or resident. Accepting this theory there would be no earthly way for any person or Court to look beyond such co-called ordination and determine whether such person is in fact a minister. He merely signs a card claiming such ordination and is immediately sent forth by the Watchtower Bible and Tract Society. According to their theory he is not subject to any of the tax laws of the country whose protection appellant now so earnestly seeks nor is he subject to a call to the armed services of our country, because he is a self-styled "ordained minister." Respondent does not know what type of literature the Watchtower Bible and Tract Society distributes in other sections of this great nation, but as shown by the record, the literature sold and distributed in the Town of McCormick was not only anti-religious but actually advocates the overthrow and destruction of Democracy. While it is claimed on the certificate offered in evidence that Jehovah's Witnesses distribute Bibles there is no testimony in this case that appellant ever had a Bible in his hands or offered one for sale; nor is there any evidence that he ever attempted to preach or set forth his religious views. The record plainly shows that he is a common commercial book agent earning a livelihood by the sale of books.

Appellant takes the position that his activity is not subject to review by any Court since he says that he is a minister of the Gospel and his activity is that of a religious colporteur. According to his theory that ends the matter. Acting on this theory any concern could declare that its activity is no longer commercial, that henceforth the distribution of its wares and merchandise is for the purpose of saving men's souls and immediately the activities of such concerns are no longer taxable. Just as long as officials of the business say they are primarily interested in promulgating religious beliefs or disseminating information they are beyond the reach of the law.

It is obvious that this reasoning is absurd. If carried to the limit every person and every corporation would be exempt from taxation. Every doctor could say that he was no longer interested in practicing medicine but was following the example of Christ in healing the sick and was therefore exempt from payment of taxes on income received as compensation for his services and for medicine given. Every distributor of food could successfully contend that he was not engaged in the sale of merchandise but merely following Christ's example of furnishing food and drink to the people of this earth without thought of any profit that might incidentally come to him. Such merchant must immediately be classed as a minister of the Gospel and as such not subject to the rules and laws made by our national, state and municipal governments.

Any lawyer might declare himself to be an ordained minister and as such declare it to be his duty to practice law according to the precept dictated by his own conscience. A certificate could be given him by a county bar association declaring him to be a minister and, accepting appellant's view, this lawyer would no longer be bound by the laws of this country or by the rules of the Court. He could not be

punished by the Court for contempt because that would be forbidden by the First and Fourteenth amendments to the Constitution of the United States. No municipality could impose a license tax upon him, nor would the fees he received for advice be subject to a tax because he would no longer be practicing law but offering spiritual advice to the lost of the world.

If this theory of appellant cannot be adopted who, then, shall pass upon the question of whose activity is religious and whose activity commercial? Beyond doubt it must be by some branch of the government. Certainly neither the legislative nor executive branch of the government has the authority to make this determination. Only the judiciary can determine the matter. That is exactly what has been done in this case. Under the laws of South Carolina a jury determines the facts and in this case the jury determined that the activities of appellant were not those of a colporteur but were commercial; that he violated the ordinance in question when he sold books in the Town of McCormick after refusing to pay the required license fee. This finding of fact was sustained by the Circuit Court of General Sessions on appeal. Under the laws of South Carolina the finding of fact by the Circuit Court on appeal, cannot be reviewed by the Supreme Court of South Carolina *Dingle v. Northwestern R. Co. of S. C.*, 112 S. C., 390. However, the Supreme Court of South Carolina found that appellant's activities were commercial and not similar to those of the Jehovah Witness in the *Meredith case*.

Appellant has taken the position that no Court has the right to determine whether his activities are religious or commercial and counsel for appellant goes so far as to state: "The Judiciary has falsely labeled it as commercial." We think this shows very plainly appellant's attitude toward our government, including the Courts.

The real issue in this case is, does a municipality have the right to collect an ordinary nondiscriminatory tax from persons using the town's streets and other facilities of the municipality for commercial purposes? As the record clearly shows the appellant was endeavoring to make a living by selling books. No one would contend that the owner of a book store located in the Town of McCormick would be exempt from the payment of a license tax required by the town ordinance, even though a large part of the store's business consisted of the sale of Bibles and other religious books. Obviously appellant's position is untenable because the purpose of the store is primarily to make a profit on the sale of books and not to promote religious beliefs. If the store is subject to the payment of this license tax we respectfully submit that appellant, under the facts as found in this case, was due to pay the tax and his failure to do so constituted a violation of the ordinance in question.

II

Was the ordinance in question void and unconstitutional on its face and as construed and applied to a book agent's activities because it abridges and unduly burdens by taxation the exercise by appellant of his right of freedom of press, contrary to the First and Fourteenth amendments to the United States Constitution?

Appellant takes the position that even though it has been found and accepted as a fact that he was not acting as a religious colporteur when he sold the books in the Town of McCormick, yet his right of freedom of press, guaranteed to him by the First and Fourteenth amendments to the United States Constitution, has been violated. He seems to rely on the case of *Grosjean v. American Press Company*, 297 U. S., 233. However, we do not find where

this Court has ever held that publishers of books or newspapers or the sellers of the books are immune from any of the ordinary forms of taxation for the support of the government. On the contrary, this Court held in the *Grosjean case:* "It is not intended by anything we have said to suggest that the owners of newspapers are immune from any of the ordinary forms of tax, but one single in kind, with a long history of hostile misuse against the freedom of the press." *Grosjean v. American Press Company,* 297 U. S., 250.

In the case now before this Court the Town of McCormick has not attempted to restrict the publication or distribution of any paper, book or other publication, but is simply requiring each person doing business for profit within the town limits of the Town of McCormick to pay an ordinary tax for the support of the municipal government. No attempt has been made to limit the number of books sold nor has any attempt been made to regulate the type of literature sold. The town is simply attempting to collect from appellant his reasonable share of taxes for the use of the conveniences provided by the municipality. He has had the use of the streets maintained by the Town of McCormick. He has had the protection of the health department, the police department and the fire department. Is it anything but reasonable to expect him to pay his share of the costs of providing these facilities?

Appellant seems especially alarmed over the ruling of this Court in *Valentine v. Chrestensen,* 316 U. S., 52, '54, and contends that the holdings in the *Chrestensen case* and the *Grosjean case* are at odds; that, in effect, the decision in the *Chrestensen case* reverses the *Grosjean case.* We cannot agree with appellant in this contention. In no case have we found that this Court has ever held that the constitutional provisions guaranteeing the freedom of the press

makes every person writing, printing, selling or distributing printed matter immune from the ordinary forms of taxation or reasonable laws regulating the publication, distribution and selling of papers, books, etc. Indeed, the Court has shown clearly, through all of its opinions in the various cases decided, that, while the freedom of press and freedom of religion is guaranteed by the Constitution, such freedom of religion and freedom of the press cannot be used as a sham to cover commercial activities and enable persons to evade the effect of other laws.

In the *Chrestensen case*, where the owner was attempting to disguise his activities by adding a civic appeal to the literature he sought to distribute, this Court said: "If that evasion were successful, every merchant who desires to broadcast advertising leaflets in the street need only to append a civic appeal or a moral platitude to achieve immunity from the law's command." *Valentine v. Chrestensen*, 316 U. S., 55.

SUMMARY

In the present case we are not concerned with the type of literature appellant was selling. While we thoroughly disapprove of attempts, by the distribution of subversive literature, to undermine and overthrow our democratic form of government, for which our young men are fighting and dying on the battlefields today, we feel that this matter is not now before this Court. This is a matter which should, and probably will be, handled by the F. B. I. and our Federal Courts. What we are concerned with here is the attempt by appellant to use the plea of abridgment of constitutional rights as to freedom of worship and freedom of the press to evade his just share of the ordinary taxes demanded by our government for certain commercial activities. Presuming, for the sake of argument, that appellant has been or-

dained as a minister, it has been determined by the Mayor's Court of the Town of McCormick, the Circuit Court of General Sessions and the Supreme Court of South Carolina that the activities complained of were commercial and that appellant was not acting as a minister when he offered to and did sell books in the Town of McCormick without having obtained a license and paid the tax required. Since these facts have been judicially determined we submit no right guaranteed the appellant under the Constitution has been abridged.

CONCLUSION

The judgment of the Court below should be affirmed.

Respectfully submitted,

J. FRED BUZHARDT,
Town Attorney, McCormick,
South Carolina.

JEFF D. GRIFFITH,
Solicitor 11th Judicial Circuit,
Saluda, South Carolina.